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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1752

PHILLIP R. HILLIARD, *Petitioner*

v.

ARMCO STEEL CORPORATION, A Corporation, and THE BUTLER ARMCO INDEPENDENT UNION, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT ARMCO STEEL CORPORATION IN OPPOSITION TO CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. 1a-5a),[1] dissenting opinion (Pet. App. 6a-12a), and opinion of the District Court (Pet. App. 14a-27a) are all unreported.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1976, and a petition for rehearing *en banc* was denied on April 15, 1976. The petition for a writ of certiorari was filed on June 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether any important or unsettled question of federal law is raised by a challenge to purely factual determinations, made after petitioner's cause of action was perfected through a trial on the merits, that the terms of the collective bargaining agreement were satisfied, and that a union fulfilled its duty of fair representation by vigorously prosecuting petitioner's claim through four steps of the grievance procedure.

STATUTE INVOLVED

Section 301 of the Labor Management Relations Act, 28 U.S.C. § 185, is set forth in the petition at pp. 3-4.

STATEMENT

Petitioner, an alcoholic, was discharged in June 1969 from his employment as a slitting machine operator at respondent Armco Steel Corporation's Butler, Pennsylvania plant. The immediate cause of the termination was petitioner's unauthorized absence from the job for a three-day period that month. However, that decisive incident was merely the latest in a sequence of offenses against the job, all related to alcohol abuse, involving petitioner's unreported or unexcused

absence from work or his inability to perform adequately when there (Pet. App. 3a, 15a, 17a).[2]

Already having been suspended twice for coming to work affected by alcohol, petitioner, in May 1965, appeared on the job in an intoxicated condition (Pet. App. 15a). First suspended, petitioner was later discharged following a hearing. However, at the third step of the grievance procedure, the respondent Butler Armco Independent Union was able to have the discharge converted into a sixty-day suspension, subject to the conditions that petitioner refrain from using alcohol, participate in the program of Alcoholics Anonymous, have periodic medical evaluation, and maintain satisfactory work performance and attendance (Pet. App. 3a, 15a-16a). Both the Union and management made it known to petitioner that noncompliance with these conditions would result in his irrevocable discharge (Pet. App. 16a).[3] Petitioner failed to abide by any of the conditions, and there were incidents of alcohol related absence by petitioner in 1967 and 1968 (Pet. App. 3a, 17a).

Although he was scheduled to work, petitioner, without giving notice or obtaining permission, failed to report to the plant on June 17, 18 and 19, 1969. Consistent with his pattern of behavior, petitioner called in on the afternoon of June 19, stated that he could not drive to work because of the effects of alcohol, and asked to be given time off for vacation (Pet. App. 3a, 17a). Shortly thereafter, a management group of

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[2] The District Court found a longstanding pattern characterized by petitioner's missing two days of work and then taking unscheduled vacation time (Pet. App. 17a).

[3] Under the governing collective bargaining contract, unreported absence is sufficient cause for discharge (Pet. App. 17a).

petitioner's supervisors met and reviewed his history of absence and poor work performance. This group determined that petitioner should be suspended for five days subject to discharge (Pet. App. 3a, 17a-18a).

The respondent Union immediately processed petitioner's grievance through a Step II hearing, after which the discharge was upheld. The discharge was also sustained after a hearing at the next level of appeal (Pet. App. 3a, 18a). Following the Step III denial of his grievance, petitioner entered a private alcoholic treatment facility called Chit Chat Farms. At the conclusion of a twenty-eight-day rehabilitative program, the institution advised Armco that petitioner had made good progress and that his prognosis was "fair to good" (Pet. App. 3a, 20a). Armed with this report, but also aware that petitioner was still drinking, the Union pressed the grievance at a Step IV hearing on September 30, 1969, arguing that petitioner had been rehabilitated and should be rehired. However, after a searching review of the record, the company again denied reinstatement (Pet. App. 3a-4a, 19a-20a).

The seven-member Union grievance committee then met to decide whether petitioner's case should be taken to the final step of the grievance procedure, arbitration. After considering the circumstances of petitioner's conditional reinstatement in 1965, the repeated warnings given petitioner about drinking, his failure to abide by conditions set forth for his continued employment, his failure to take advantage of repeated opportunities and forbearance, and the admitted fact that he was still drinking, the committee members unanimously decided that the discharge was for good cause and that it should not be taken to arbitration (Pet. App. 4a, 20a). The District Court found that each

member "exercised his own independent judgment in a fair and unbiased manner" and that none had any personal animus concerning petitioner (Pet. App. 21a). The Committee's decision was announced to petitioner and to the general membership at a Union meeting. Neither petitioner nor anyone else voiced objection (Pet. App. 4a, 21a). Approximately two years later, petitioner filed suit in the District Court, alleging for the first time that the Union breached its duty of fair representation by not taking the grievance to arbitration, and that Armco had breached the collective bargaining agreement by not awarding petitioner a leave of absence.

At trial, petitioner introduced the testimony of Dr. William J. Browne, a psychiatrist, in an attempt to demonstrate that alcoholism was an illness within the meaning of the collective bargaining contract for which he should have been granted a leave of absence.[4] Regarding this testimony, the District Court found:

> Although in recent years alcoholism has been classified as a disease and even though this may be the more enlightened opinion, it is apparent that this view is not unanimous. Dr. Browne . . . conceded that there are many physicians, psychiatrists and lay people who do not consider alcohol to be a disease. (Pet. App. 24a.)

Dr. Browne had agreed that some doctors and laymen still maintain that alcoholism is not a disease and noted that some psychiatrists look upon it as a symptom

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[4] Article VIII, § M of the contract provides in pertinent part:

> Any employee who is known to be ill or disabled, whose illness or disability is supported by evidence satisfactory to the Plant Physician, will be granted sick leave automatically for the period of such illness or disability . . . .

of other diseases. He also testified that the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association sets forth three categories of alcoholism, based upon varying levels of habitual excessive drinking, each of which is classified as a disease. Dr. Browne, however, disagreed with the Association, and was of the opinion that only the most extreme of the categories of alcoholism, alcohol addiction, was a disease (Pet. App. 24a-25a).

The District Court also found "that prior to 1956, the American Medical Association did not classify alcoholism as a disease. The contract provision was in existence prior to 1956." (Pet. App. 25a.) Moreover, the testimony adduced from both Union and management negotiators demonstrated that none of the parties to the contract "ever intended or understood § M to apply to employees addicted to alcohol and the clause has never been applied to such employees." (Pet. App. 23a.) Indeed, alcoholics had been discharged at other times and the provision had not been applied. Evidence of the non-applicability of the provision also derived from "the fact that in 1971 the Union sought during negotiations to obtain a provision in the contract for a leave of absence for alcoholics." Pet. App. 23a.) [5]

Based on all the evidence, the District Court concluded that the Union had acted properly and in good

[5] The District Court additionally noted:

> Also in evidence is a publication issued by the company in 1972 calling alcoholism a disease. This very publication, however, pointed out that the company still had the right to discharge alcoholics, thus reinforcing the evidence that neither the company nor Union viewed § M as being applicable to alcoholics. (Pet. App. 25a.)

faith and that petitioner had failed to prove that his discharge was without just cause (Pet. App. 25a-26a). Calling the factual predicate "unassailable," the Court of Appeals affirmed the judgment (Pet. App. 5a).

ARGUMENT

Stripped of the unnecessary appendages that petitioner seeks to attach to it, the case at bar quite simply involves the factual assessment of a union's compliance with a standard of fair representation already enunciated with great clarity by this Court in *Vaca* v. *Sipes,* 386 U.S. 171 (1967). *See Humphrey* v. *Moore,* 375 U.S. 335 (1964). The only relevant area of inquiry, therefore, is whether the evidence by which the trial court reached its conclusions was properly admitted. This inquiry too is concluded by the application of well-established legal principles. Moreover, the factual determinations made according to these principles are plainly correct and their context is quite narrow. For these reasons, we submit, the instant case presents no unsettled or important federal question of law and does not warrant review by this Court on certiorari.

For petitioner's suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to have been successful he would have had to establish a concommitant breach of the duty of fair representation by the Union and a breach of the collective bargaining contract by Armco. *Vaca* v. *Sipes, supra; Hubicki* v. *ACF Industries, Inc.*, 484 F.2d 519 (3d Cir. 1973); *Bazarte* v. *United Transportation Union*, 429 F.2d 868 (3d Cir. 1970). In this case, there could be no proof of either of these elements without demonstrating that the parties intended the sick leave clause of the contract to apply to alcoholics.

In *Vaca* v. *Sipes, supra,* this Court held that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. This is necessarily so because the union, as the representative of all its members, is invested with considerable discretion in electing whether to proceed under the grievance procedures of its contract or to settle. Accordingly, the individual employee has no absolute right to compel the arbitration of his grievance. Nor is a breach of the duty of fair representation established merely by subsequent proof that the union acted negligently or with bad judgment or that the grievance was meritorious. *Id.* at 191, 195; *Bazarte* v. *United Transportation Union, supra,* 429 F.2d at 870. *See also Cannon* v. *Consolidated Freightways Corp.,* 524 F.2d 290 (7th Cir. 1975); *Woods* v. *North American Rockwell Corp.,* 480 F.2d 644 (10th Cir. 1973); *Turner* v. *Air Transport Dispatchers Ass'n.,* 468 F.2d 297 (5th Cir. 1972).[6]

[6] Petitioner contends that there is disagreement among the Circuits regarding the extent of a union's duty to exhaust all available avenues of the grievance procedure. However, to the extent that there is any difference at all, it is one of slight degree and has no bearing on the instant case.

Petitioner (Petition at 8) and the dissenting judge (Pet. App. 9a-10a) seem to find conflict between cases broadly upholding decisions not to process grievances, *e.g., Cannon* v. *Consolidated Freightways Corp., supra,* and *Bazarte* v. *United Transportation Union, supra,* and cases where no personal bias was shown toward the aggrieved member but the union was nevertheless held to have violated its duty of fair representation, *e.g., Ruzicka* v. *General Motors Corp.,* 523 F.2d 306, *rehearing en banc denied,* 528 F.2d 912 (6th Cir. 1975), and *De Arroyo* v. *Trabajadores Packinghouse,* 425 F.2d 281 (1st Cir.), *cert. denied,* 400 U.S. 877 (1970). However, *Ruzicka* and *De Arroyo,* which involved unions which perfunctorily processed or totally ignored their members' grievances, are easily distinguishable from the contrasted cases, and especially from the case at bar, in which the Union responsibly demonstrated the "honest purpose and judgment" that the First Circuit found wanting in *De Arroyo,* 425 F.2d at 284. Rather than ignoring the information it had, as petitioner inaccurately asserts that it did (Petition at 7-8), the Union, as the District Court found (Pet. App. 20a-21a), after vigorously sponsoring petitioner's claim through four steps of the grievance procedure, carefully considered all of the facts before concluding that the discharge was for good cause and that arbitration should not be pursued.

In this case, the Union's judgment was plainly correct. On the face of the contract itself, it would be unreasonable to expect that the illness and disability leave provision would serve to immunize petitioner from his repeated job related offenses and his repeated refusals to follow through with rehabilitative efforts and benefit from the forbearance and assistance of his employer and co-workers.[7] A leave provision, like § M,[8] simply cannot foreclose an employer from discharging a worker who elects to resume drinking and who, as a result, can never assure that he can provide a reasonable level of job attendance and work performance.[9]

This sensible interpretation was borne out by the District Court's examination of the evidence of the

[7] Petitioner cites no authority, either arbitrations or judicial decisions, and we know of none, for the proposition that alcoholism is covered in routine clauses in collective bargaining agreements which permit automatic leaves of absence for illness or disability.

[8] See note 4, *supra.*

[9] What ever the physiological manifestations of petitioner's being unable to stop drinking once he starts, he clearly exercised volition in eschewing rehabilitative efforts and beginning to drink again. This subjective, volitional aspect of alcoholism thus differentiates that condition from recently discovered disorders, such as those mentioned by the dissenting judge (Pet. App. 11a), which are defined by clearly objective pathogenic factors, and which are unanimously recognized as diseases.

intent of the parties in formulating the sick leave provision of the contract and demonstrates that the Union's decision not to arbitrate was the good faith product of a reasoned decision [10] and that Armco had not breached the contract.

To determine whether or not the leave of absence provision was intended to apply to alcoholics, the court did the logical thing: it received testimony concerning the intention of the parties in negotiating the provision and the manner in which the provision was later applied. This use of extrinsic evidence is at the crux of petitioner's position; he is incorrect in his objection.

Contrary to petitioner's contention (Petition at 7), this case does not involve the use of extrinsic evidence "to amend" the sick leave clause but rather to determine what the crucial word of the clause meant.

> "[E]xtrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties * * * not to show that 'the parties meant something other *than* what they said' but to show 'what they meant *by* what they said.' * * * Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement * * * —as well as to subsequent acts or declarations of the

[10] The view of the members of the Union's grievance committee as to the scope of § M was significant in assessing their state of mind regarding the issue of their good faith. Since their fulfillment of the duty of fair representation did not depend upon the correctness of their decision, the extrinsic evidence of their understanding of the contract also may be viewed as admissible independently of the question of contractual interpretation by the court.

> parties 'shedding light upon the question of their mutual intention at the time of contracting.' * * *." *Peerless Casualty Co.* v. *Mountain States Mutual Casualty Co.*, 283 F.2d 268, 278 (9th Cir. 1960), *quoting Beneficial Fire & Casualty Insurance Co.* v. *Kurt Hitke & Co.*, 46 Cal. 2d 517, 524, 297 P.2d 428, 431 (1956) (emphasis in original).

This is precisely the principle followed by the District Court and approved by the Court of Appeals, and correctly so.

The "parole evidence rule" is not addressed to the question of interpretation. *See* 3 A. CORBIN CONTRACTS § 579 (1960 ed.). Even where a document represents the complete integration of contractual terms, the meaning of ~~any~~ term subject to conflicting interpretations, such as "illness" here, may be proved by extrinsic testimony. *Ass'n of Machinists and Aerospace Workers* v. *Sargent Industries*, 522 F.2d 280 (6th Cir. 1975); *Lucie* v. *Kleen-Leen, Inc.*, 499 F.2d 220, 221 (7th Cir. 1974); *Chase Manhattan Bank* v. *First Marion Bank*, 437 F.2d 1040, 1048-1049 (5th Cir. 1971); *Rea Construction Co.* v. *B. B. McCormick & Sons, Inc.*, 255 F.2d 257 (5th Cir. 1958). *Compare Perry* v. *Sinderman*, 408 U.S. 593, 602 (1972). The testimony from Union and management negotiators that the sick leave provision was not meant to apply to alcoholics and has never been so applied was thus properly received.[11]

[11] *Local 13* v. *General Electric Co.*, 531 F.2d 1178 (3d Cir. 1976), and *Ass'n of Westinghouse Salaried Employees* v. *Westinghouse Corp.*, 283 F.2d 93 (3d Cir. 1960), cases cited by petitioner and the dissenting judge, are inapposite to the instant case, as the Third Circuit itself recognized in deciding it and then denying rehearing *en banc*. These cases hold that, absent an ambiguity, extrinsic evidence is inadmissible to demonstrate that the subject

Once admitted, the evidence very clearly showed that the leave provision of § M was never intended to apply to alcoholics, either at the time the section was first negotiated, when even the American Medical Association did not designate alcoholism as a disease, or throughout the time of its operation, when alcoholics were discharged and the provision was not applied. Indeed, as Dr. Browne conceded, there is still a division of medical opinion on the subject. Moreover, the Union's understanding that the existent provision did not cover petitioner was evidenced in 1971, long after petitioner's discharge, when the Union sought in its negotiations to obtain a leave provision for alcoholics. In 1972, Armco itself, reiterated in a company publication that it still had the right to discharge alcoholics.

Of course, petitioner's discharge was not the result of his mere status as an alcoholic. In fact, over many years, petitioner was the beneficiary of great forbearance and assistance by both management and the

matter of a particular claim was excluded from the arbitration provision of the collective bargaining contract. The question here is merely the meaning of a term *within* the contract and has nothing to do with any attempt to alter the agreement.

Moreover, in *Local 13,* (537 F.2d at 1183 n.13), the court did indeed consider extrinsic evidence in confirming the conclusion it had reached without it ("Consideration of the extrinsic evidence, as well as the interpretation of the contract on its face, compels the conclusion that the position of Local 13 is without merit."). The court also recognized that at least three Circuits allow the admission of bargaining history evidence, even absent an ambiguity; and in light of this Court's statement in *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 567 (1960), and its affirmance of *Independent Pet. Workers* v. *American Oil Co.,* 324 F.2d 903 (7th Cir. 1963), *aff'd,* 379 U.S. 130 (1964), the court in *Local 13,* recognized that the position the dissenting judge has exposed "may be appropriate for re-examination."

Union. Even after his 1965 discharge and conditional reinstatement, petitioner continued to drink and to miss work. Ultimately, the conclusion became inescapable, not that petitioner was an alcoholic, but that he would not do those things necessary to bring his condition under control, and that he could not perform adequately on the job or even keep up regular attendance. It is clear, we submit, that absenteeism, work under the influence of alcohol and poor job performance are more than reasonable grounds for dismissal. And, after years of toleration and assistance, when it was apparent that petitioner would not rehabilitate himself, Armco had no contractual obligation to retain him as an employee. Accordingly, the District Court's judgment in favor of respondents, and the Court of Appeals' affirmance, were entirely proper.[12]

[12] Petitioner exceeds his standing and the scope of the controversy when he argues derivatively from an unnecessarily voiced concern of the dissenting judge that *Vaca* v. *Sipes, supra,* intimates "that, if a union acts in good faith, under exclusive grievance procedures, the employee cannot carry his contract claim to federal district court." (Pet. App. 9a.) From this reasoning, petitioner suggests that the holding of the Court of Appeals allows a union to decline to enter arbitration for any reason whatsoever and then "be free from any judicial challenge from an injured member." While we would submit that *Vaca* and its progeny would have supported the dismissal of petitioner's complaint in light of the Union's consideration of all the evidence and reasoned determination not to proceed, the fact of the matter is that petitioner's claim was fully aired in a trial. Rather than eluding judicial challenge, the Union's decision was thoroughly examined in the District Court, where it was upheld. The availability of judicial review is thus not a matter at issue in the case at bar.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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